No. 4003

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

G. W. BRAINARD, as trustee of the estate of PACIFIC CO-OPERATIVE LEAGUE STORES (a corporation, bankrupt),

Petitioner,

vs.

FLOYD J. IRWIN, J. H. GOSNEY, FRED O. LLOYD, FRANK W. LESNET, BERTHA A. BURGESS, EDWARD BURGESS, W. A. GARA, T. MCKIERNON, CLARENCE S. KING, and J. H. PHILLIPS,

Respondents.

BRIEF FOR RESPONDENTS.

PERRY EVANS,
Attorney for Respondents, Floyd J. Irwin, J. H. Gosney, Bertha A. Burgess, Edward Burgess and Clarence S. King.

W. E. GEARHART,
Attorney for Respondents, Fred O. Lloyd and J. H. Phillips.

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BRIEF FOR RESPONDENTS.

The order of the Referee, granting these claimants priority, was based upon the proposition that these claimants were *clerks,* because their work was essentially that of clerks, notwithstanding they were sometimes designated as "managers" of the branch stores of the bankrupt concern and performed certain minor and incidental duties of a managerial character, such as making up reports (oftentimes

after their regular hours: Tr. p. 17), and supervising the other clerks.

From the Referee's certificate we quote as follows:

> "From the testimony I gather that the position of these claimants mainly called for hard work as clerks and salesmen. * * * They are not the managers of that enterprise or of the League Stores Corporation. As persons in charge of the respective stores their authority is so far subordinated to the head office that the designation as 'chief clerk' described their position more accurately than the title 'manager', and according to the testimony of Mr. Dobbs they were treated as chief clerks in charge by the head office" (Tr. p. 28).

The District Court, upon the trustee's petition for a review, affirmed the order of the Referee without making any findings.

Questions for Consideration.

A. Were these claimants "clerks"? If so, there is an end to the controversy, because the statute expressly grants priority to "workmen, clerks", etc. (Bankruptcy Act, Sec. 64b; 9 U. S. Comp. Stat. Ann. (1916), Sec. 9648).

B. Is the question just propounded a "matter of law" or a mere question of fact? For only a "matter of law" can be considered in this proceeding.

Respondents' Points.

A. The decision of the lower court was correct in holding that these claimants were clerks.

B. The only point involved is one of fact, namely, whether or not the work of these claimants was that of "clerks". The finding that their work was that of clerks cannot be reviewed by this proceeding, which is solely to "revise in matter of law" (Bankruptcy Act, sec. 24b; 9 U. S. Comp. Stat. Ann. (1916), sec. 9608), and the petition, therefore, should be dismissed.

A.

THE DECISION OF THE DISTRICT COURT WAS CORRECT.

In support of the decision of the District Court, we submit the following comment:

1. Managerial Duties Merely Incidental.

The fact that an employee whose essential duties are those of a clerk and salesman may also perform incidental or minor duties as a manager will not deprive him of his right to priority:

> "It seems to me, on the evidence, that everything done by him as the manager of the Portland office was subordinate to the work he did as traveling salesman, and inconsiderable in comparison with that portion of his work."
>
> *In re Gay*, 188 Fed. 392, 394.

Where it appeared that a claimant was both president and manager of a bankrupt corporation, but

> "that he also acted in the capacity of clerk in the store of said company under an agreed salary of $200 per month * * * that his services as manager were nominal, * * * that the claimant was obliged to discharge the duties as manager (to the extent that a manager's services were required), in addition to his duties as clerk,"

and that it was "small services" which his position as manager required, it was held, by the District Court of this district, in an opinion written by Judge Dooling, that the claimant was entitled to priority:

In re Capital Paint Co., 239 Fed. 424.

> "If the principal services rendered by the claimant have been performed in any such capacity [as clerk or salesman], then the preferred character of the claim for such work is not affected by the fact that the claimant also incidentally and secondarily to the occupation and work for which and in which he was engaged, and for which said compensation is claimed, performed supervisory or even managerial duties and powers."

In re Cost Cut Counterbore Co., 283 Fed. 670, 671-2.

And even where a person is employed as "consulting engineer and rubber expert", if his duties ultimately become mainly manual he is entitled to priority, notwithstanding his somewhat exalted title, according to the Circuit Court of Appeals for the Sixth Circuit in

Emerson v. Castor, 236 Fed. 29, 40.

2. Supervision of Other Employees Not Irreconcilable With Position of Clerk.

That some of these claimants had other clerks employed by them and working under their directions is not a circumstance that can have the effect of transforming them into anything more lofty than clerks, for clerks and salesmen they continued to be. See *In re Cost Cut Counterbore Co.,* supra, where it appeared that the claimant "had two men working under him as such sales manager" (p. 670). See also *Blessing v. Blanchard,* 223 Fed. 35, cited by petitioner, where the claimant Winn, who was "superintendent" of the shop and "had authority to hire and discharge the men in his department", was nevertheless granted priority, since he did "the same kind of work in the shop as did the men who worked under him" (p. 36).

3. Power to Purchase Supplies.

The authority to purchase goods is in no way controlling. If a cook in a household or in a hotel be given authority to do all the ordering of food, does that fact transform him into a "manager"? Is he any the less a "servant"? Similarly, a clerk may be a purchasing clerk. Petitioner states in his brief (p. 8) that these claimants, in addition to ordering merchandise, "fixed prices for sale of same." We do not consider this a very important factor, but inasmuch as petitioner seems to consider it so, we think it proper to state that we find no such evidence in the record. It is, on the contrary, more

than probable, and at least we are entitled to presume from the record, that the selling prices were fixed under direction of the business managers, either by correspondence or through visiting supervisors.

4. Facts of the Case.

All of these so-called "managers" were told, when they were employed, that they "were expected to do any and all work that would ordinarily be expected of a chief clerk" (Stipulation concerning testimony, Tr. p. 12); and the Referee's certificate, from which we have quoted in the opening paragraph of this brief, contains, as we have seen, this finding of fact:

> "From the testimony I gather that the position of these claimants mainly called for hard work as clerks and salesmen" (Tr. p. 28).

5. Petitioner's Authorities Distinguished.

The cases cited by the petitioner are all readily distinguishable. We have no dispute with the ruling of the *Blessing* case, 223 Fed., to the effect that the word "servant", as used in the statute under consideration, is to be given a limited meaning, that it is not synonymous with "employee", and that a "*general* manager", employed as such, at a salary of $300 per month, is neither a servant nor a salesman, "notwithstanding that he may *also* have rendered services as a salesman" (pp. 36, 37; italics ours). The general manager in that case "had the general control and direction of the workmen in the employment of the bankrupt in all its departments"

(p. 36). It is clear from this statement that his services as salesman must have been minor and incidental, and that his position was much more important than that of a "clerk".

In *Ye Ladies Shoppe, Inc.* (now reported in 283 Fed. 693), the agreed statement of facts showed that the claimant who asked for priority was one of the incorporators of the company, a director of the company, its president, and the owner of one-third of its capital stock (283 Fed. 694). She was employed as "manager *and* buyer and saleswoman", and in presenting her claim

> "no apportionment was made or attempted to be made * * * between what is due to her for her services as manager and what is due to her for her services as buyer and saleswoman" (p. 694).

Consequently, there was no basis for the court holding in that case, as the Referee and District Court have held in this case, that the services as manager could be disregarded, as being minor and incidental.

In the *Greenberger* case, 203 Fed., as appears from the quotation from the opinion in petitioner's brief, the general manager of the store, where the clerks were all women, "as incident to the performance of his duties as general manager", kept the store clean, and "did some clerical duty". But it is distinctly stated that

> *"He was not employed to do that work, but to manage the business,* and he was paid for

> managing it and not for performing such menial service as he did perform as incident to the management" (p. 584; italics ours).

Quite different from the present case, where, as the Referee certifies, *"the position of these claimants mainly called for hard work as clerks and salesmen."*

Petitioner is then driven to go so far afield as to cite *In re Albert O. Brown & Co.,* 171 Fed. 281, to the effect that the manager in charge of the Chicago office of a New York brokerage firm, who would of necessity be an important business executive, is not a "clerk". We readily concede this, but point to the great dissimilarity between such a position and that of a man engaged in handling groceries in a country store and selling them over the counter, which was what these claimants were hired to do.

Finally, *In re Crown Point Brush Co.,* 200 Fed. 882, is cited to the effect that one might be employed a definite number of hours as a general manager or assistant general manager, and a definite number of hours as a workman, in which case he would be allowed priority for a portion, only, of his entire compensation. But in this case the work of these claimants was at all times essentially that of clerks and salesmen, and for no portion of the time worthy of notice were they performing any "managerial" duties. They come, therefore, within the principle of the cases cited under subdivision "1", supra.

6. Conclusion on the Facts.

These claimants are people dependent on their labor for their daily bread, and the law grants them priority for that reason. It may lessen the amounts payable to the general creditors, but the hardships of bankruptcy must fall somewhere. It may be that some of the general creditors have suffered losses they can ill afford—others may give no second thought to their unprofitable venture. But they have taken their chances, while these claimants were shielded against the element of chance, to the extent of their wages for a definite period, by the provisions of the law. This court, we trust, will not demolish that shield, merely because these clerks and salesmen have been called "managers" of the several branch stores, when their duties were essentially those not of officials, but of working people.

B.

THE PETITION SHOULD BE DISMISSED.

We have briefed the case upon its merits before setting forth our reasons for asking dismissal of the petition, in order that it may plainly appear that the matter sought to be reviewed is solely a question of fact: namely, was the work of these claimants that of clerks? Questions of fact cannot be debated on a petition for revision:

> "In the case of original petition this court has authority to review merely a matter of law

> arising in the course of the proceeding below. The latter is intended as a summary mode of reviewing any supposed erroneous holding upon a question of law, and *does not contemplate a review of the facts* * * * The petition in such case should state specifically the question of law which was involved and was ruled upon by the court below, and should be accompanied by a certified copy of so much of the record as will exhibit the manner in which the question arose, and its determination. Such question of law, so presented, is the question and the only question that can properly be ruled upon by this court upon an original petition."
>
> *In re Richards,* 96 Fed. 935, 937 (italics ours).

The Circuit Court of Appeals, Sixth Circuit, speaking through Judges Taft, Lurton and Day, quotes the above ruling, and says:

> "This meets with our approval, and properly indicates the character of question which may be thus reviewed, and a proper mode of presenting it. The facts as they appear from the order sought to be reviewed, or as stated in the opinion of the court, or in the summary of evidence certified by the referee, where it appears that the order of the referee was reviewed by the district judge only upon such summary certified to him, *must be treated as settling the facts* upon which the 'matter of law' arises which is sought to be reviewed."
>
> *Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brew. Co.,* 101 Fed. 699, 703 (italics ours).

This court, speaking through Judges Ross, Gilbert and Morrow, has said:

> "As in the case a consideration of the facts is essential to any review of the decision of the court complained of, it is clear that the appeal cannot be treated as a petition for revision, as is suggested by the appellant may be done. That is only permissible where questions of law only are involved. * * *
>
> "In the light of these authorities, it seems that the case at bar is not appealable under section 25a of the bankrupt act, and, as the record shows that the asserted lien of the appellant depends upon controverted facts, it clearly is not subject to revision under section 24b."
>
> *Gaudette v. Graham,* 164 Fed. 311, 312, 314.

And this court again (Judges Gilbert, Morrow and Rudkin) holds:

> "But in a proceeding of this kind [review] we are neither required nor permitted to review the testimony."
>
> *Olmsted-Stevenson Co. v. Miller,* 231 Fed. 69, 70.

Followed, in the Eighth Circuit, in

> *Wm. R. Moore Dry Goods Co. v. Brooks,* 240 Fed. 943, 945.

And from the Circuit Court of Appeals, Second Circuit, we quote as follows, in four cases:

> "This being a petition to revise, we take the facts as found below. Our power is limited to correction in matters of law. Therefore we do not consider the suggestion that some at least

of the sums claimed were received by Bolognesi during insolvency and under circumstances raising a trust ex maleficio. The master has found the evidence the other way, and we cannot say that such finding amounted to error of law upon the testimony."

In re A. Bolognesi & Co., 254 Fed. 770, 772.

"* * * it is of course well settled that in the case of a petition for revision, as the statute confers jurisdiction 'to superintend and revise in matters of law' it does not contemplate any review of the facts by the appellate court, and only questions of law decided by the court below can be brought up for revision in this mode."

In re Nagel, 278 Fed. 105, 107.

"The court, on petition to revise, cannot review questions of fact, but only questions of law."

In re B. & R. Glove Corporation, 279 Fed. 372, 375.

"It is well settled that in these proceedings on petition to review in matter of law, the master's findings of fact, approved by the District Judge, are not brought up for review."

In re Caponigri, 183 Fed. 307, 308.

The Circuit Court of Appeals, Fifth Circuit, speaking to the same point, says:

"In a petition to review a referee's order in bankruptcy, affirmed in the District Court, the jurisdiction of the Circuit Court of Appeals is

limited to the facts as found by the referee and in the trial court."

Whitney Cent. Trust & Sav. Bank v. United States C. Co., 250 Fed. 784, 787.

See, also

Bassett v. Evans, 253 Fed. 532, 533;
Ross v. Stroh, 165 Fed. 628, 630.

As there are no findings, and this court is not called upon to review the testimony, no matter of law is properly presented, and the petition should be dismissed.

Dated, San Francisco,
May 28, 1923.

Respectfully submitted,

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